(6)

No. 97-128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

When nonunion employees wish to challenge the agency fee they are required to pay under an agency-shop agreement, must they exhaust the "impartial decisionmaker" procedure mandated by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), before bringing their claim to court?

LIST OF PARTIES

The parties before the Court are the same as the parties in the court below. They are:

Petitioner (appellee below)

Air Line Pilots Association

Respondents (appellants below)

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Neal E. Alberts
Clarence A. Anderson
J. Eric Anderson
J.L. Armstrong
Donald E. Asay
David J. Baccitich
Gerda H. Baitis as representative for the deceased Walter W. Baitis
R.B. Barnes
David Bauer
Allan G. Blake
Dale N. Boschetto
Richard A. Breems
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John C. Brittenhaus
Robert Brushwyler
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Payton H. Cook, Jr.
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Marcus Covington, Jr.
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Brian Decker
Timothy L. Dermer
Joseph H. DeVelis
W. David Doiron
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John D. Durris
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Joseph M. Elder
Jerry D. Elmore
Bruce E. Elmquist
Robert D. Engel
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Harvey L. Hayden
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Warren B. Young
Robert V. Ziminsky

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTION AND STATUTES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-428

AIR LINE PILOTS ASSOCIATION,
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v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 108 F.3d 1415, and is reprinted in the separately bound appendix to the petition for certiorari (Pet. App.) at page 1a. The United States District Court for the District of Columbia issued three separate opinions plus an order denying a motion to amend or alter the judgment, none of which is officially reported. They are reproduced, respectively, at Pet. App. 21a, 44a, 62a and 41a. The Amended Opinion and Award[1] of Arbitrator Louis

[1] The Amended Opinion and Award was identical to the arbitrator's original Opinion and Award except for nonsubstantive typographical and editorial corrections.

Aronin, whose findings of fact were accepted by the district court, is reprinted at Pet. App. 71a. The arbitrator also issued a Supplemental Opinion and Award, which is reprinted at Pet. App. 158a.

JURISDICTION

The decision of the court of appeals was issued on March 14, 1997. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the court of appeals on June 9, 1997. (Pet. App. 162a, 164a). The petition for certiorari was filed on September 5, 1997, and granted (in part) on November 26, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 2 Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh, provides in pertinent part:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

Petitioner Air Line Pilots Association (ALPA) is a labor organization that represents the pilots employed by most U.S. commercial air carriers, including Delta Air Lines, Inc. In November 1991, ALPA and Delta negotiated several amendments to their existing collective bargaining agreement, including an "agency shop" provision. (J.A. 30-34). This provision requires all represented pilots who choose not to become or remain members of ALPA to pay a "service charge" to ALPA in an amount equal to ALPA's dues and certain assessments. ALPA has similar agreements with most other airlines with which it bargains.

Respondents, who are pilots employed by Delta, brought this action in December 1991 to enjoin implementation of the agency-shop agreement.[2] The jurisdiction of the dis-

[2] The original complaint was filed by five pilots, only three of whom remain in the case as respondents before this Court. One of the original plaintiffs, Donald Pedrazzini, voluntarily withdrew from the case while it was still pending in the district court. Another, Bruce R. Booher, was dismissed by the district court because he was an ALPA member, and he ultimately withdrew from the appeal. The other respondents are 150 fee-payer pilots (one of whom is now deceased and represented by his executor) who were permitted to intervene by the district court and who participated in the appeal.

trict court was invoked on the basis of 28 U.S.C. §§ 1331 and 1337, and 29 U.S.C. § 412. The original complaint alleged seven separate grounds on which respondents claimed the agreement was unlawful under federal statutory and constitutional law, and a subsequent amendment to the complaint added two more grounds (J.A. 10-29, 46-48). The district court, in three separate decisions (Pet. App. 21a, 44a, 62a), dismissed all of respondents' claims. Most of those claims were abandoned on appeal.

This Court's limited grant of certiorari concerns an issue that arose out of one of respondents' claims—*i.e.*, the claim that ALPA does not properly calculate the percentage of its expenses that are germane to collective bargaining and therefore chargeable to objecting agency-fee payers under applicable decisions of this Court. In response to this claim, ALPA contended, *inter alia*, that respondents were required to exhaust the "impartial decisionmaker" procedure mandated by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The district court agreed, but the court of appeals did not. This exhaustion issue is the sole issue now before this Court.

ALPA's Policies And Procedures Applicable to Agency Fees

After this Court issued its decision in *Hudson*, ALPA adopted written "Policies and Procedures Applicable to Agency Fees" (J.A. 66-70) designed to comply with the requirements of that case. These Policies and Procedures:

(1) inform nonmember fee payers how to notify ALPA if they have an objection to paying for activities that are not germane to collective bargaining;

(2) require ALPA to prepare and distribute each year to all fee payers a "Statement of Germane and Nongermane Expenses" (SGNE), audited by ALPA's independent auditors, disclosing "in reasonable detail, the year's

expenditures, segregating those that were germane to collective bargaining from those that were not";

(3) provide that all fee payers who submit a written objection will receive an appropriate dues reduction, rebate, or credit, based on the percentage of ALPA's expenses that the SGNE shows were used for purposes not germane to collective bargaining; and

(4) provide an arbitration procedure by which an objector may challenge ALPA's calculation of the dues reduction or rebate. If the objector so requests, the amount reasonably in dispute will be placed in escrow. The selection of the arbitrator, and the procedures of the arbitration, are governed by the American Arbitration Association Rules for Determination of Union Fees.[3]

The Arbitration Proceeding In This Case

The first year that respondents were required to pay an agency fee pursuant to the Delta agency-shop agreement was 1992. (Pet. App. 1a-2a). The SGNE for that year was issued in 1993, after ALPA's 1992 books had been closed and audited. (Pet. App. 118a-157a). It showed that 19 percent of ALPA's expenses in 1992 were not germane to collective bargaining. (Pet. App. 120a).

One hundred seventy-four pilots requested arbitration of the 1992 calculation as reflected in the SGNE. Included were four of the original plaintiffs in this case, plus many (but not all) of the pilots who later intervened in this case. A number of these pilots later sought to withdraw from the arbitration, expressing a preference for pursuing their claims exclusively in court. (Pet. App. 72a). Shortly before the arbitration hearing, respondents requested the district court to enter a preliminary injunction to stop the arbitration until the court could determine whether exhaustion of the arbitration procedure was a pre-

[3] The American Arbitration Association Rules are reproduced at J.A. 84-94.

requisite to the lawsuit. (J.A. 54). The injunction was denied on the eve of the arbitration hearing. (J.A. 111). Respondents' counsel then appeared at the arbitration and stated that he was entering a "conditional appearance" on behalf of all of his clients (J.A. 134-35), even though some had never requested arbitration and others had withdrawn their requests.

The arbitrator ultimately ruled that only those fee payers who had submitted timely requests for arbitration prior to the hearing in accordance with ALPA's procedures were parties to the arbitration proceeding. (Pet. App. 73a-75a). Respondents did not contest this ruling.

The arbitration hearing occurred over three days, during which both oral testimony and documentary evidence were presented. Respondents' counsel participated actively in the proceeding. After the close of the hearing, both sides submitted comprehensive written briefs. (Pet. App. 71a-72a).

ALPA assumed the burden of proving to the arbitrator that it had an accurate and reliable record-keeping and accounting system, and that it had correctly allocated all of its expenses for the year on the basis of whether they were germane or not germane to collective bargaining.

To meet this burden, ALPA's witnesses first described ALPA's governance structure, its administrative management, and the size and role of its various staff departments. They also described the manner in which ALPA performs its collective bargaining and grievance handling responsibilities, and the ways in which its staff provides such support services as legal advice, economic and financial analysis, technical information, communications, and the like.

ALPA's witnesses also described ALPA's accounting system, and how ALPA uses that system to prepare its annual Statement of Germane and Nongermane Expenses.

Briefly summarized, this evidence showed that ALPA's accounting system simultaneously tracks costs in two separate ways. First, it maintains a traditional ledger system that charges every expense to a "natural" account—*i.e.*, an account reflecting the "nature" of the expense such as salary, rent, or professional services. Second, it also includes a functional accounting system that simultaneously charges each expense to a specific "project" account based on the purpose for which the money is spent. Each project has a numerical code, and there is a system for establishing a new project code whenever a new project is begun. In 1992, there were approximately 1200 active projects to which expenses were charged.

ALPA's computers will not issue a check for any expense unless the appropriate accounting information, including project number, is entered. To provide this information, all internal vouchers, requisition forms, expense statements, and the like require a project number. Similarly, in order to properly charge employee salary and benefit expenses, all employees submit weekly time reports identifying each project on which they worked each day of the week, and the number of hours devoted to that project. Employee salaries and benefits are allocated to the projects based on these weekly time reports. A similar system of time reporting and cost allocation is used for pilot members whose airline pay is reimbursed by ALPA when they perform union work.

ALPA's Finance Director explained how the project accounts are used to prepare the SGNE. It is his responsibility, with the assistance of counsel, to examine each project and make a determination of whether it is germane to collective bargaining. Each project is then assigned to one of the four germane or seven nongermane expense categories in the SGNE.[4] A list showing all of the proj-

[4] An explanation of each of these categories is included in the SGNE. (Pet. App. 126a-130a).

ects, by category, is attached to the SGNE. (Pet. App. 131a-157a).

The arbitrator issued a 40-page written decision, in which he "address[ed] each of the issues raised in this proceeding at the hearing, by briefs, or by comments from Challengers, topic by topic." (Pet. App. 73a). With respect to each issue, the arbitrator reviewed both the record of the proceeding and the relevant judicial decisions. One of respondents' principal contentions, both in the arbitration and in court, was that the evidence ALPA had presented based on its accounting records was insufficient to satisfy its burden of proof, that ALPA had to provide direct evidence of the nature and purpose of each individual expense incurred during the year—voucher by voucher, time sheet by time sheet, check by check.[5] The arbitrator rejected this contention and held that ALPA had satisfied its burden:

> Counsel for the Challengers argues that, absent a detailed explanation of every claimed expenditure, it may not be allowed as a germane expense. We disagree. The Union has provided ample detail to justify its expenditures, both by project listing and by explanation of the nature of the expenditures.

(Pet. App. 90a).

The arbitrator also decided numerous disputed issues concerning specific projects and categories of expenses. He upheld ALPA's chargeability determinations in most respects, but directed ALPA to reallocate expenses in four areas from germane to nongermane, and ALPA did so. The reallocations resulted in an increase in the nongermane percentage for 1992 from 19 to 20.49 percent. The

[5] In the district court respondents sought discovery of all documentation relating to all individual expenses incurred during the year 1992, such as cancelled checks, invoices, vouchers, time sheets, purchase orders, travel authorizations, and expense reports. These records filled approximately 100 file boxes.

arbitrator approved this recalculation in his Supplemental Opinion and Award. (Pet. App. 158a-161a).

The Decisions Of The District Court

As noted above, the district court issued three separate decisions concerning the merits of this case. The first two of these decisions dealt with issues that, given this Court's limited grant of certiorari, are not relevant here. In the third decision, issued on August 30, 1995, the court held that nonunion employees who wish to challenge the calculation of their agency fees must exhaust the "impartial decisionmaker" procedure mandated by *Hudson*.[6] Therefore, those of the plaintiffs who were not parties to the arbitration could not pursue their claims in court. (Pet. App. 27a-32a). In justifying this conclusion, the court stated:

> The Court concludes that the requirement of exhaustion of arbitral remedies and the standard of review set forth above give effect to the procedures established by the Supreme Court in *Hudson* and prevent the situation whereby unions subject to the RLA would have to defend their agency shop fee calculations in two separate trials every year—both in an arbitration proceeding and in a lawsuit brought by nonmembers who elect not to participate in the arbitration.

(Pet. App. 31a-32a).

The Court Of Appeals Decision

The court of appeals reversed the district court on several grounds, including the issue of exhaustion. It held that respondents were not required to exhaust the arbitra-

[6] The court also held that the proper standard of review of the arbitration decision would be to "defer to the findings of fact of the arbitrator unless those findings are clearly erroneous," but to "review *de novo* the arbitrator's legal conclusions." (Pet. App. 22a). This issue was excluded from this Court's grant of certiorari.

tion procedure, because they had never agreed to arbitration.

The court recognized that "[t]he circuits are split as to whether a union, obliged by federal law to offer *Hudson*-style arbitration to nonmembers challenging the amount of agency fees that they are charged, is entitled to insist on 'exhaustion' before the dissident employees come to federal court." (Pet. App. 10a). The court also acknowledged that Justice White's concurring opinion in *Hudson* had expressed the view that exhaustion was required. The court concluded, however, that there was "no *legal* basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position." (Pet. App. 11a, emphasis in original; footnote omitted).

SUMMARY OF ARGUMENT

In a long line of cases this Court has held that a union may not use funds paid under a union-security agreement by objecting fee payers for purposes that are not related to the union's collective bargaining role. In applying this rule in any given case, countless issues will arise concerning precisely which of the union's myriad activities during the relevant period are chargeable and which are not, and whether the union has adequately tracked and accounted for the thousands of individual expenditures it incurred.

In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court established procedures for dealing with such issues. The union must provide "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310. The issue of whether agency-fee objectors must exhaust this procedure before challenging the union's fee calculations in court was not presented, although Justice White, in a concurring opinion joined by Chief Justice Burger, stated that exhaustion would be required. *Id.* at 311. That is the issue now before the Court.

Where, as here, the issue of exhaustion is not controlled by statute, it is decided on the basis of "sound judicial discretion." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). The exercise of such discretion is particularly appropriate in this area of the law, where all the governing rules have been established judicially rather than legislatively.

Several strong reasons support a requirement of exhaustion of the *Hudson* procedures. First, a basic purpose of those procedures—to relieve the courts of having to "micromanage" agency-fee calculations—would not be achieved if objectors could proceed directly to court. Second, in the absence of an exhaustion rule, some objectors would likely opt for arbitration while others chose to sue immediately in one or more courts, thereby generating litigation of the same issues simultaneously in two or more forums. Third, if an arbitration does take place, it could produce an outcome satisfactory to all parties, thereby avoiding court litigation entirely. Fourth, if court litigation does take place, the arbitration record and decision will help define and narrow the issues, disclose strengths and weaknesses in the parties' respective positions, and thus streamline both pretrial and trial procedures.

There are no significant countervailing considerations militating against an exhaustion requirement. The *Hudson* requirement that the arbitration be "prompt" ensures that the time required for exhaustion will not be excessive, and in any event the escrow required by *Hudson* protects the objectors from injury resulting from delay. The remedy available through arbitration is fully adequate, and the procedure is fair and impartial.

ARGUMENT

EXHAUSTION OF THE IMPARTIAL-DECISION-MAKER PROCEDURE MANDATED BY *HUDSON* SHOULD BE REQUIRED BEFORE AN AGENCY-FEE PAYER MAY CHALLENGE A FEE CALCULATION IN COURT.

A. The Substantive Legal Background.

The question presented in this case is procedural in nature, but no procedural question can be properly considered without reference to the substantive legal principles that the procedures at issue would implement. We begin, therefore, with a brief review of the substantive legal background against which the procedural issue arises.

In a series of cases beginning with *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), this Court imposed limits on the purposes for which unions may use funds received from objecting fee payers pursuant to agency-shop agreements or similar forms of union-security arrangements. The early cases held that an objector's payments could not be used for political or ideological purposes to which he or she is opposed. *Street, supra; Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1963); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Later cases expanded the prohibition to the use of objectors' funds for those activities, even if not political or ideological, that are determined to be unrelated to the union's role as collective bargaining representative. *See Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). To the extent that the union incurs expenses outside of these limitations, it must give objecting fee payers a pro rata fee reduction.

This body of law has been developed by the Court as a matter of both statutory interpretation and constitutional

law. In the private sector, the Court has determined that the statutory provisions that authorize union-security agreements may not be construed to permit such agreements to be used to compel objecting fee payers to support union activities that are unrelated to collective bargaining. *See International Ass'n of Machinists v. Street, supra* (Railway Labor Act); *Communications Workers v. Beck*, 487 U.S. 735 (1988) (National Labor Relations Act). In the public sector, the Court has held that the use of governmental power to compel workers to support a union against their will is permissible only to the extent that such compulsion bears a reasonable relationship to the collective bargaining process; otherwise, such compulsion would be an excessive intrusion on freedom of speech and association under the First Amendment. *See Abood v. Detroit Bd. of Educ., supra.*

This Court has twice articulated general standards for determining which union expenses are chargeable to objecting agency-fee payers and which are not. In *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. at 448, the test was said to be:

> . . . whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.

In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. at 519, a public-sector case, the Court stated:

> . . . chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

These broad standards have proven to be distressingly difficult to apply. Modern unions are large, complex,

multifaceted organizations. In any given year, their members, officers, and employees engage in a wide range of union-sponsored activities; their facilities are used for a multiplicity of purposes; and, in the case of larger unions, their treasuries expend tens of millions of dollars per annum, issuing hundreds of thousands of individual checks to thousands of different recipients. No matter how meticulous and conscientious a union may be in keeping its financial records and categorizing its expenses based on the *Ellis* and *Lehnert* standards, an objector—who may be hostile to the union for other reasons and resentful of having to share *any* union costs—can always find issues to raise concerning the union's record-keeping or its allocation or characterization of specific expenses.

It should not be surprising, therefore, that this has been a fertile field for litigation, particularly since a well-financed organization, the National Right to Work Legal Defense Foundation (which represents the respondents here), devotes a large part of its resources to the support of litigation challenging the administration of union-security agreements.

B. The Procedural Requirements Of *Hudson*.

Hudson established three procedural requirements that unions must meet in implementing the substantive principles outlined above. The Court held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, *a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker*, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310 (emphasis added). With respect to the requirement of an impartial decisionmaker, the Court explained:

> Although we have not so specified in the past, we now conclude that such a requirement is necessary. The nonunion employee, whose First Amendment

> rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner.

475 U.S. at 307 (footnote omitted).

The *Hudson* opinion indicates that one of the Court's purposes was to provide an alternative, nonjudicial mechanism for dealing with the many complexities that arise in agency-fee disputes. The Court noted that it had twice previously suggested that unions establish such alternative procedures voluntarily. *Id.* at 307 n.19, citing *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. at 122 and *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 240 & n.41. In *Allen* the Court had referred to the "practical difficulties" of administering a judicial remedy, and commented:

> It is a lesson of our national history of industrial relations that resort to litigation to settle the rights of labor organizations and employees very often proves unsatisfactory. The courts will not shrink from affording what remedies they may, with due regard for the legitimate interests of all parties; but it is appropriate to remind the parties of the availability of more practical alternatives to litigation for the vindication of the rights and accommodation of interests here involved.

373 U.S. at 122, 123-24. In *Hudson* the Court decided to make such "practical alternatives to litigation" mandatory rather than voluntary.

Although *Hudson* was a public-sector case arising under the First Amendment, the present parties and the courts below have all presumed that the same requirements would apply to unions covered by the Railway Labor Act. As the court of appeals put it, "[w]e see no reason why [the] statutory duty of fair representation owed to nonmember agency shop employees carries any fewer proce-

dural obligations than does a constitutional duty." (Pet. App. 10a).[7]

The majority opinion in *Hudson* did not discuss the question of whether a fee payer must exhaust the impartial-decisionmaker procedure before challenging an agency-fee calculation in court. That issue was not raised on the facts presented. Nevertheless, Justice White, joined by Chief Justice Burger, addressed the issue in a concurring opinion:

> [I]f the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

475 U.S. at 311.

The exhaustion issue did arise later in *Hudson*, after the case was remanded to the district court. When the union in that case took steps to comply with this Court's decision, the plaintiff teachers raised various new issues, one of which was that a new disclosure notice issued by the union was inadequate, because the union had incorrectly calculated its chargeable and nonchargeable expenses. Specifically, the plaintiffs contended that the union had

> based its fee calculation on an incorrect definition of collective bargaining services, identified categorical expenses too broadly, relied on an economically "invalid" method for allocating costs between chargeable and non-chargeable categories, allocated as chargeable costs activities which do not benefit teachers, employed "incomplete, insufficient, and misleading" accounting verifications, and used incorrect formulas in calculating allocable costs for collective bargaining.

Hudson v. Chicago Teachers Union, Local No. 1, 922 F.2d 1306, 1313-14 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991). This new contention squarely raised the issue of whether the court should review the union's fee calculation on the merits or require that issue to be submitted to an impartial decisionmaker. The Seventh Circuit ruled that the matter must first proceed to arbitration:

> Requiring the federal courts to micromanage the fee calculation in every case challenging a union's fair share fee would place an overwhelming and unrealistic burden on the courts. . . . Contrary to the plaintiffs' position, *Hudson* did not contemplate that federal courts would be required, on the basis of the notice, to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected. Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair

[7] The courts below also relied on *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956), which held that union-security arrangements under the Railway Labor Act are subject to review under the First Amendment. The rationale of this holding was that the Railway Labor Act, by displacing state laws that prohibit union-security agreements, makes such agreements the equivalent of an action of the federal government. While *Hanson* has never been overruled, and therefore was considered binding precedent in the courts below, this Court should no longer follow it. Its reasoning is inconsistent with later decisions of this Court, which hold that private conduct does not become state action for constitutional purposes merely because it is permitted or authorized by state law or regulation. Rather, the government must have exercised "coercive power" to cause the action in question, or "provided such significant encouragement . . . that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (and cases there cited). The Railway Labor Act in no way coerces or encourages parties to enter into agency-shop agreements; it merely permits them.

> share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. . . . Of course, the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court.

922 F.2d at 1314 (emphasis in original). *Accord: Crosetto v. Heffernan*, 810 F. Supp. 966, 982 (N.D. Ill. 1992), *aff'd in part, vacated in part on other grounds sub nom. Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994). In a subsquent case the Tenth Circuit reached the same conclusion, pointing out that, unless exhaustion was required, the impartial-decisionmaker requirement would be " 'largely a waste of time and money,' "[8] and "we would more often be forced to micromanage the fee calculation in every case challenging a union assessment." *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1522 (10th Cir. 1996).[9]

[8] Quoting *Bromley v. Michigan Educ. Ass'n-NEA*, 843 F. Supp. 1147, 1153 (E.D. Mich. 1994), *rev'd*, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 682 (1997).

[9] As the decision below noted, there are also cases to the contrary. *E.g., Bromley v. Michigan Educ. Ass'n-NEA*, 82 F.3d 686, 694-95 (6th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 682 (1997); *Knight v. Kenai Peninsula Borough School Dist.*, 1997 WL 751724 at pp. *9-10 (9th Cir. Dec. 8, 1997). *See also Hohe v. Casey*, 956 F.2d 399, 406-09 (3d Cir. 1992) (exhaustion is not required with respect to the constitutional issue of whether a particular activity is chargeable, but may be required as to accounting disputes concerning the amount spent for any activity).

These were all public-sector cases brought under 42 U.S.C. § 1983, and they relied heavily on the principle that exhaustion of *state* remedies is not required before an action can be brought under that statute. *See Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). The impartial-decisionmaker procedure required by *Hudson*, however, is not a state remedy; rather, it is a federal remedy which a public-sector union has a *constitutional* duty to provide. It would therefore not be at all inconsistent with *Patsy*

C. The Reasons Why Exhaustion Should Be Required.

Where not explicitly governed by statute, the issue of whether administrative remedies must be exhausted is a matter committed to "sound judicial discretion." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Exhaustion may be required by "judicial decision rather than specific congressional demand." *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971). The exhaustion issue presented in this case is particularly appropriate for resolution on the basis of judicial discretion, since all the procedural requirements of *Hudson* were established judicially, not legislatively. Indeed, the issue here arises in the context of an entire body of law the details of which are not found in any statute or regulation, but instead have been developed by this Court to achieve the goals of the relevant labor statutes and the First Amendment.

Therefore, the mere fact that the *Hudson* impartial-decisionmaker procedure is not a voluntary arbitration procedure agreed upon between the parties is not dispositive of the exhaustion issue, as the court of appeals thought. ALPA, after all, is required to provide that procedure whether it wishes to do so or not. The question of whether the objectors should be required to exhaust that procedure, therefore, also should not be decided solely on the basis of their preference in the matter. Rather, it must be decided in the exercise of judicial discretion, informed by all relevant prudential considerations, including those that caused the Court to mandate the procedure in the first place.

The court of appeals also expressed the view that exhaustion can only be required when it is "applied to en-

to require exhaustion of the *Hudson* procedure in public-sector cases bought under § 1983. *See also* Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. Rev. 857, 881 (1988) (arguing that an objector suffers no constitutional injury that would be actionable under § 1983 until "after the arbitrator's award frees the union to spend objectors' fees on arguably objectionable matters").

sure that senior officials in a government agency have authoritatively ruled, in accordance with available procedures, on an issue that a party attempts to bring to court based on a preliminary decision of a subordinate official." (Pet. App. 5a). The cases make clear, however, that courts have much broader discretion to require exhaustion for any reason deemed sound by the court.

In *McCarthy v. Madigan, supra,* for example, the Court identified two separate and independent reasons that can support a requirement of exhaustion—one being "protecting administrative agency authority" and the other being "promoting judicial efficiency." 503 U.S. at 145. The Court went on to cite, as possible "judicial efficiency" reasons, (a) the possibility that "a judicial controversy might well be mooted, or at least piecemeal appeals may be avoided" by requiring exhaustion, and (b) the likelihood that "exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.* It is thus apparent that the court of appeals here defined the exhaustion doctrine much too narrowly.

Not surprisingly, the exhaustion doctrine is not limited only to administrative procedures of governmental agencies. For example, in *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965), the Court held that an employee seeking severance pay pursuant to a collective bargaining agreement could not sue his employer without first exhausting the grievance and arbitration procedure provided by the agreement. Exhaustion was deemed appropriate in that case not for any reason relating to the "authority" of any "senior official," but because (1) "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes," (2) the union has a legitimate interest in "participat[ing] actively in the continuing administration of the contract," (3) the employer has a legitimate interest in "limiting the

choice of remedies available to aggrieved employees," and (4) exclusive grievance procedures are important to maintaining stability of collective bargaining relationships. 379 U.S. at 653.

There are similarly strong reasons why this Court should require exhaustion of the *Hudson* procedures.

First, as noted above, one of the apparent purposes of *Hudson* is to establish an alternative dispute resolution procedure to relieve the courts of having to "micromanage" agency-fee calculations. That goal will not be achieved if employees are free to circumvent the procedure and go directly to court.

Second, in the absence of an exhaustion requirement, a union could be confronted by *simultaneous* agency-fee challenges, in court and before a *Hudson* impartial decisionmaker. That is precisely what happened here. A number of fee payers who were not litigants in this case requested arbitration under ALPA's procedures, thereby requiring ALPA to go to arbitration regardless of the wishes of the pilots who had brought this lawsuit. The respondents, meanwhile, wanted to avoid the arbitration and press their lawsuit. In the absence of an exhaustion requirement, both groups of pilots would have been entitled to proceed, and the same issues would have been litigated simultaneously in two forums, with ALPA defending the same allocations and determinations in both places. Furthermore, such duplicative litigation could occur every year, since a new agency-fee calculation is required every year based on that year's activities and expenses.

The court of appeals acknowledged "the union's problem of defending its actions in two separate fora," but suggested that there were ways this problem might be avoided without imposing an exhaustion requirement. (Pet. App. 11a-13a). The court's proposed solutions, however—negotiation of an agreed-upon arbitration mech-

anism, replacing arbitration with expedited court litigation, or use of class action procedures—are all highly impractical. To begin with, each one would require *all* agency-fee challengers to act as a single, unified group. That is a quite unrealistic expectation. The number and identity of such challengers vary from year to year, they work for different employers and live in different parts of the country, they do not all know each other, none of them has any means of communication with the entire group, they do not necessarily have the same motivations, concerns, or objections, and they certainly have no single spokesperson. Furthermore, there is no mechanism for ALPA even to negotiate with the entire group, much less to reach an agreement with all of its individual members. And, finally, agency-fee objectors have no incentive to cooperate with a union in solving the problem of duplicative litigation; it is, after all, to their advantage to have a choice of forums. Thus, contrary to the court of appeals, the only practical solution to the problem is to impose an exhaustion requirement.

Exhaustion would serve other salutary purposes as well. It is possible that, at least on some occasions, all parties will accept the decision of the arbitrator, thus obviating the need for court litigation. In addition, even if an arbitration decision is followed by litigation, the record of the arbitration proceeding, and the arbitrator's decision, should help to define the issues before the court and streamline both pretrial and trial procedures.[10] *Cf. McCarthy v. Madigan*, 503 U.S. at 145 ("[E]xhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.").

[10] We argued below, and the district court held, that once a *Hudson* impartial decisionmaker has rendered a decision his findings of fact should be accepted by a reviewing court unless clearly erroneous, and only his legal conclusions would be reviewable *de novo*. The court of appeals did not reach that issue, and this Court has excluded it from its grant of certiorari. But even if one assumes that after the arbitration procedure has been exhausted the challengers would be entitled to a *de novo* judicial consideration of all issues, the arbitration record and decision should still be helpful in expediting such consideration.

Finally, there are no significant countervailing considerations militating against an exhaustion requirement. In *McCarthy, supra*, the Court identified "three broad sets" of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. They are (1) when the "administrative remedy may occasion undue prejudice to subsequent assertion of a court action," either because of the effect of the time delay involved or some other prejudicial factor, (2) where there is doubt as to whether the administrative procedure can provide an adequate remedy, and (3) "where the administrative body is shown to be biased or has otherwise predetermined the issue before it." 503 U.S. at 146-49. None of these factors cuts against exhaustion here.

The time required to complete an agency-fee arbitration is generally not great, and in any event the challengers are protected against prejudice by the escrow requirement imposed by *Hudson*. The remedial authority of the arbitrator is as broad as a court's. And while challengers have occasionally contended that the American Arbitration Association is somehow biased, there is no basis whatever for that contention and it has been uniformly rejected.[11]

Respondents will no doubt attack the fairness of the AAA arbitration procedures, as they did in the court be-

[11] *See Grunwald v. San Bernardino City Unified School Dist.*, 994 F.2d 1370, 1376-77 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1534-35 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987); *Kidwell v. Transportation Communications Int'l Union*, 731 F. Supp. 192, 204 (D. Md. 1990), *aff'd in part, rev'd in part on other grounds*, 946 F.2d 283 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992).

low, on the grounds that they do not follow the federal rules of evidence or provide the same broad discovery that is available in the federal courts. This Court has rejected such arguments as a basis for not enforcing an agreement to arbitrate federal statutory claims, even when the arbitration, unlike here, is a binding substitute for court litigation. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). And *Hudson* itself states that "a full-dress administrative hearing, with evidentiary safeguards" is not required. 475 U.S. at 308 n.21.

Moreover, because the union has the burden of proof and must affirmatively present evidence explaining and justifying its agency-fee calculation, objectors would normally have little need for prehearing discovery. If, after the union's evidence is presented, an objector requires access to union records or information to prepare a response, he can request such evidence pursuant to Rule 14 of the American Arbitration Association rules, which empowers the arbitrator to require a party "to produce such additional evidence as the arbitrator may deem necessary." (J.A. 90). Furthermore, the issue here is merely whether the arbitration remedy should be exhausted before any lawsuit is brought; this Court has already made clear that the arbitration would not be "preclusive." 475 U.S. at 308 n.21. Thus, if in a particular case the challengers could show that the arbitration procedures were somehow inadequate or unfair, the court in a subsequent lawsuit would undoubtedly give them appropriate latitude to supplement the arbitration record.

In short, any fair weighing of the relevant prudential considerations tips the scale sharply in the direction of requiring exhaustion of the *Hudson* procedures. If such exhaustion is required, the impartial-decisionmaker procedure envisioned by that case will play a meaningful role in resolving agency-fee disputes, and minimize the extent to which the courts will be called upon to micromanage fee determinations. Without such a requirement, the pro-

cedure will become nothing more than a useless burden on the unions that are forced to provide it.

CONCLUSION

For the reasons stated, the judgment below should be reversed and the case remanded to the court of appeals for further proceeding in accordance with this Court's ruling.

Respectfully submitted,

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